

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

JAN 13 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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Amendment of the Commission's )  
Rules To Establish New )  
Personal Communications )  
Services )

GEN Docket No. 90-314

REPLY COMMENTS OF MCCAW CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw") hereby submits its reply to comments on the petitions for reconsideration and clarification in the above-captioned docket.<sup>1</sup> The record now before the Commission supports the adoption of the following actions on reconsideration in this proceeding:

- Elimination of the cellular eligibility restrictions and authorization of cellular carrier participation in personal communications services ("PCS") on the same basis as all other interested parties.
- Clarification, in the event the Commission does retain any cellular eligibility restrictions, that any party, including cellular carriers, may bid for PCS licenses as long as they come into compliance with the ownership rules before initiating service.
- Clarification that entities may subdivide PCS licenses on a geographic and/or spectrum basis.
- Comparable treatment of ESMRs if the Commission retains the cellular eligibility restrictions.

<sup>1</sup> 8 FCC Rcd 7700 (1993) (Second Report and Order). Pursuant to an Order Denying Extension of Time, DA 93-1575 (Dec. 29, 1993), comments on the petitions were to be submitted by January 3, 1994. Replies are due January 13, 1994. McCaw filed a petition for reconsideration and clarification ("McCaw Petition") seeking certain relief from the Commission.

I. THE RECORD SUPPORTS ALLOWING CELLULAR CARRIERS  
TO PARTICIPATE FULLY IN PCS LICENSING

The comments on the petitions for reconsideration and clarification reflect emphatic support for McCaw's position that cellular carriers should be permitted to participate in PCS licensing on comparable footing with all potential applicants.<sup>2</sup> The record shows that the benefits of cellular carrier participation will be obtained from cellular operator involvement in the PCS marketplace throughout the country, including within their cellular regions.<sup>3</sup> At the same time, arguments about possible anticompetitive behavior by cellular carriers are based solely on speculation and lack any documentary evidence whatsoever in the record compiled before the Commission.<sup>4</sup> Further, the record demonstrates that other

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<sup>2</sup> E.g., Bell Atlantic at 10-11; GTE at 2-4; NYNEX at 6-7.

<sup>3</sup> E.g., Bell Atlantic at 10; NYNEX at 6-7.

<sup>4</sup> E.g., Bell Atlantic at 10; GTE at 2-3. The arguments made by Cablevision certainly contain no documentation of its claims. See Cablevision at 4. Similarly, PCS Action simply repeats many of the unfounded arguments previously made by MCI. PCS Action at 14-15. Its statements about the respective incentives of cellular carriers and new entrants to develop PCS offerings are made without providing any basis whatsoever other than PCS Action's own self-interest. Finally, GCI states, "[a]s GCI discussed in previous pleadings, the existing cellular carriers have an incentive to achieve a dominant position in the cellular marketplace and to hinder other entities from developing PCS to its full potential." GCI at 3. See also id. at 6-7. McCaw has previously demonstrated that GCI has provided no evidence -- only speculation -- in support of  
(continued...)

potential PCS applicants possess competitive advantages that can be extended to the development of PCS systems;<sup>5</sup> rather than bar these entities -- such as local exchange carriers, interexchange carriers, and cable companies -- from full PCS participation, however, the Commission has sought to encourage their inclusion. Thus, the Commission should eliminate newly adopted Section 99.204, thereby deleting all aspects of the eligibility restrictions uniquely imposed upon cellular carriers.<sup>6</sup>

Only MCI and GCI seek to enlarge the already excessive limitations on the participation of cellular carriers in the PCS marketplace. The commenting parties, however, have recognized the MCI and GCI proposals for what they in fact represent -- an effort by MCI and GCI to misuse the Commission's regulatory processes to protect themselves and their national consortia concept from fair and effective competition.<sup>7</sup> Although MCI and GCI have attempted to bolster their assertions in their comments on the petitions, they

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<sup>4</sup>(...continued)  
this claim, and this deficiency is not resolved by GCI's comments.

<sup>5</sup> E.g., GTE at 3.

<sup>6</sup> As McCaw has previously noted, the adverse consequences of retaining new Section 99.204 will be exacerbated if the Commission adopts combinatorial bidding proposals. See McCaw Petition at 4; McCaw Comments at 9.

<sup>7</sup> See, e.g., Bell Atlantic at 11; CTIA at 3; GTE at 5-8; NYNEX at 4; Sprint at 2, 4; TDS at 12-13.

still have failed to provide any valid or factual documentation of the alleged problems they have presented to the Commission for remedy.<sup>8</sup> The relief sought by these entities should be summarily rejected.<sup>9</sup>

II. IN THE EVENT THE COMMISSION RETAINS ANY  
RESTRICTIONS ON FULL CELLULAR CARRIER  
PARTICIPATION IN PCS, IT SHOULD CLARIFY THAT  
CELLULAR CARRIERS MAY BID FOR PCS LICENSES ON  
AN UNRESTRICTED BASIS SO LONG AS THEY COMPLY WITH  
THE ELIGIBILITY LIMITATIONS AS OF THE DATE THEY  
INITIATE PCS OPERATIONS

In its petition, McCaw urged the Commission to clarify its rules, in the event the cellular eligibility restrictions are unwisely retained, to permit cellular carriers to bid for any PCS licenses, so long as the carrier comes into compliance with the rules by the date on which its PCS operations are initiated.<sup>10</sup> McCaw's petition demonstrated that requiring divestiture of cellular interests in advance

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<sup>8</sup> See also CTIA at 4 n.13; GTE at 5-8.

<sup>9</sup> One commenter agrees that modifying the cellular eligibility restrictions is appropriate, but only to permit cellular carriers to help fund designated entities desiring to bid for PCS licenses. Murray at 8. While the record in this proceeding and the competitive bidding proceeding (Implementation of Section 309(j) of the Communications Act Competitive Bidding, 8 FCC Rcd 7635 (1993)) demonstrate that a number of existing cellular operators would like to pursue the opportunity of participating in PCS in conjunction with one or more designated entities, there is no supportable rationale offered for so narrowly and artificially defining the permissible entry of cellular carriers into PCS.

<sup>10</sup> McCaw Petition at 6.

of the PCS auctions would have a number of adverse consequences for the public interest.<sup>11</sup> At the same time, adopting McCaw's proposal would not have any anticompetitive consequences.<sup>12</sup>

The record supports adoption of McCaw's proposal. Other parties have concurred in McCaw's analysis of the adverse consequences that would result if cellular operators were required to divest their cellular systems so that they would have a chance -- with unknown probabilities of success -- to bid for PCS spectrum.<sup>13</sup> Parties opposing a more rational divestiture policy -- GCI, for example<sup>14</sup> -- clearly are acting to take advantage of the Commission's procedures to limit the possible competition they may face in PCS bidding as well as in the PCS marketplace. The Commission should

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<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> E.g., Bell Atlantic at 12-13 n.32; Cablevision at 7-8 (cellular carriers should be required to divest cellular interests within six months of issuance of PCS license); CTIA at 14-15 (necessary divestitures should be required only after the submission of successful bids); GTE at 8; TDS at 10.

<sup>14</sup> See GCI at 12. GCI alleges that permitting divestiture as proposed by McCaw would lead to delays in initiation of PCS operations. The carriers, however, would still need to comply with service initiation and build-out requirements. See new Section 99.206. Moreover, the record reflects the fact that cellular carriers view PCS as a competitive opportunity to provide new services. If anything, cellular carriers will have incentives to expedite service. See PMN at 3-4.

reject these anticompetitive efforts, which will further hinder cellular carriers from establishing effective PCS offerings, and instead adopt the approach offered by McCaw and others, which clearly will promote achievement of the Commission's policy goals regarding PCS auctions and competition.

III. PCS LICENSEES SHOULD BE PERMITTED TO SUBDIVIDE THEIR OPERATING AUTHORITY BY GEOGRAPHIC AREA OR SPECTRUM

McCaw, in its petition, demonstrated that a Commission clarification that PCS licensees would be free to partition their operating authority would manifestly serve the public interest.<sup>15</sup> The record contains further recognition of these benefits and concurrence in the recommended clarification.<sup>16</sup> GTE, for example, notes that "this flexibility would expedite the introduction of new services, promote participation in PCS by additional entities, and create incentives for the development of innovative niche offerings."<sup>17</sup> AIDE urges the Commission to "permit the voluntary partitioning of PCS markets, by bidding consortia, full-market settlements, or post-grant modification applications."<sup>18</sup>

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<sup>15</sup> McCaw Petition at 6-8.

<sup>16</sup> AMT/DSST at 3; AIDE at 5; GTE at 9-10.

<sup>17</sup> GTE at 9.

<sup>18</sup> AIDE at 5.

Not surprisingly, opposition to this proposal comes from those parties that have consistently sought to bar the full participation of cellular operators as PCS competitors.<sup>19</sup> This opposition is particularly curious, since the benefits of such partitioning will reach a range of members of the public. The partitioning proposal, while it could have effects on cellular carrier participation, is by no means designed to be a relief effort for cellular operators. Moreover, like many of their other arguments, the opponents to the partitioning clarification offer no sound, factually supported basis for their position.

IV. IF THE COMMISSION UNWISELY RETAINS THE CELLULAR ELIGIBILITY RESTRICTIONS, THE UNDERLYING RATIONALE SUPPORTS EXTENSION OF THE LIMITATIONS TO ESMR OPERATORS AS WELL

In its comments on the petitions for reconsideration and clarification, McCaw agreed with several petitioners that, "[t]o the extent the Commission decides to retain the eligibility limitations on cellular operators, such spectrum cap should be applied as well to ESMRs."<sup>20</sup> As would be

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<sup>19</sup> E.g., GCI at 15-16; MCI at 3-5. Nextel also opposes partitioning, arguing that this option would "inject additional variables into the initial auction process and complicate the development of an orderly aftermarket." Nextel at 13. Nextel has not supported this conclusion with any explanation of its reasoning, nor could it do so.

<sup>20</sup> McCaw Comments at 12-13 n.24.

expected, Nextel has vehemently opposed any limitation on its participation in the PCS market.<sup>21</sup>

Nextel's procedural and substantive arguments in opposition to comparable treatment between ESMRs and cellular operations simply are not persuasive. Applicant eligibility to seek PCS licenses has been an issue throughout this proceeding,<sup>22</sup> thus overcoming Nextel's objections based on the Administrative Procedures Act.<sup>23</sup>

While the precise parameters under the Budget Act for comparable treatment of commercial mobile service providers are not yet fully defined, the rationale applied to justify limitations on cellular participation in PCS does support comparability of regulation in this situation.<sup>24</sup> Notwithstanding Nextel's assertions that the Commission only cared about whether cellular carriers have market power,<sup>25</sup> and that it, as a new market entrant, clearly cannot have market power, ESMRs like Nextel have in fact positioned themselves to compete with cellular. Nextel elsewhere boasts in its comments on the petitions for reconsideration that it

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<sup>21</sup> Nextel at 3-10.

<sup>22</sup> See U S West Petition at 21.

<sup>23</sup> See Nextel at 4-6.

<sup>24</sup> See, e.g., AIDE at 21; TDS at 11.

<sup>25</sup> Nextel at 8-9. McCaw has disputed any conclusion that it or other cellular carriers possess market power. See McCaw Comments at 8-9.



"holds spectrum licenses in top U.S. markets, covering a population of over 100 million."<sup>26</sup> This potential coverage far exceeds anything available to any single cellular carrier.<sup>27</sup> Accordingly, under the regulatory parity mandated by the Budget Act, ESMR participation in PCS should be subject to the same standards governing the entry of cellular carriers into PCS.

V. CONCLUSION

The PCS reconsideration proceedings provide the Commission with an opportunity to improve on the steps taken in the Second Report and Order. The record now before the agency warrants Commission action consistent with the principles set forth above. Adoption of such steps will help to ensure the competitive success of PCS and its development

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<sup>26</sup> Nextel at 2.

<sup>27</sup> The record demonstrates that cellular carriers have no more incentive and no more ability to engage in anticompetitive behavior in relation to PCS, whether as an adjunct to existing cellular operations or as an effort to quash potential competition. Accordingly, as demonstrated previously, the public interest would best be served by abolishing the cellular eligibility restrictions in their entirety.

as a critical element of the national telecommunications infrastructure.

Respectfully submitted,

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January 13, 1994

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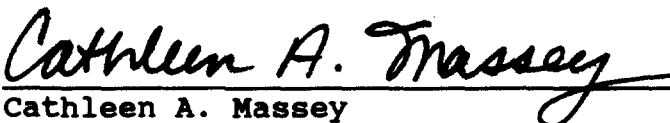
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